

# Antipsychotic Drugs and Fitness to Stand Trial: The Right of the Unfit Accused to Refuse Treatment

Due process prohibits the trial of a criminal defendant who, due to mental illness, is unfit to stand trial.<sup>1</sup> To be fit, a defendant must have “‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him.’”<sup>2</sup> Antipsychotic drugs<sup>3</sup> can be used to improve the cognitive functioning of persons suffering from psychosis,<sup>4</sup> and persons who would otherwise be unfit to stand trial have been held to meet the fitness requirement when treated with antipsychotic drugs.<sup>5</sup> Although these rulings have worked to the benefit of mentally ill defendants wishing to go to trial under medication,<sup>6</sup> they have also

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<sup>1</sup> *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975); *Pate v. Robinson*, 383 U.S. 375, 386 (1966); see *infra* notes 44-45 and accompanying text. This comment will use the term “unfit” strictly in the sense of a legal inability to stand trial. “Incompetent,” though often used as a synonym in this context, will be used here to refer to the legal incapacity to care for oneself. See *infra* note 110.

<sup>2</sup> *Dusky v. United States*, 362 U.S. 402, 402 (1960) (quoting statement of the Solicitor General).

<sup>3</sup> Antipsychotic drugs, formerly known as “major tranquilizers,” include such drugs as Thorazine (chlorpromazine), Mellaril (thioridazine), Prolixin (fluphenazine), Haldol (haloperidol), and Stelazine (trifluoperazine). See 1 *Drugs in Institutions: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 570-80 (1975) [hereinafter cited as *Senate Hearings*]. Antipsychotic drugs are a subcategory of a group of compounds known as psychotropic (mind affecting) drugs. This group includes other therapeutic drugs, such as sedatives and ordinary tranquilizers, as well as psychedelic drugs, narcotics, and alcohol. See Klerman, *Psychotropic Drugs as Therapeutic Agents*, in *PSYCHIATRY AND ETHICS* 430, 444 n.1 (R. Edwards ed. 1982); Winick, *Psychotropic Medication and Competence to Stand Trial*, 1977 *AM. B. FOUND. RESEARCH J.* 769, 779. Thorazine, the prototypical antipsychotic drug, was introduced in 1952. Klerman, *supra*, at 431.

<sup>4</sup> See *infra* notes 12-24 and accompanying text.

<sup>5</sup> See, e.g., *Government of Virgin Islands v. Crowe*, 391 F. Supp. 987, 989 (D.V.I.), *aff'd mem.*, 529 F.2d 511 (3d Cir. 1975); *State v. Hayes*, 118 N.H. 458, 461, 389 A.2d 1379, 1381 (1978); *State v. Jojola*, 89 N.M. 489, 491, 553 P.2d 1296, 1298 (Ct. App. 1976); *Ake v. State*, 663 P.2d 1, 7 (Okla. Crim. App. 1983), *rev'd on other grounds sub nom. Ake v. Oklahoma*, 105 S. Ct. 1087 (1985); *Commonwealth v. Blair*, 491 Pa. 499, 502, 421 A.2d 656, 657 (1980); *State v. Law*, 270 S.C. 664, 671, 244 S.E.2d 302, 305 (1978).

<sup>6</sup> See, e.g., *State v. Hampton*, 253 La. 399, 402, 218 So. 2d 311, 312 (1969) (fact that remission of psychosis was due to antipsychotic drugs is of “no legal consequence”; court should not “look beyond existing competency and erase improvement produced by medical

been extended to situations in which the state seeks to bring to trial defendants who do not wish to submit to drug treatment.<sup>7</sup>

By analyzing the question of forced administration of antipsychotic drugs simply as a question of fitness, most courts ignore the effect of the drugs on the defendant's ability to function as a defendant. Defendants may object to going to trial under the influence of antipsychotic drugs because the drugs affect mood and emotion as well as rational thought,<sup>8</sup> often producing a trusting and apathetic attitude that undercuts an effective defense. In addition, the defendant's demeanor in court may also work against him by misleading the jury about his probable mental state at the time of the crime or by prejudicing the jury against him.

This comment will show that, although the state has a strong interest in bringing criminal defendants to trial, it should not be permitted to compel defendants to go to trial by subjecting them to medication that weakens their ability to assume the role of a criminal defendant.<sup>9</sup> A narrow focus on fitness obscures proper consideration of the complete range of protections to which a criminal defendant is entitled. It is not enough to note that the state has, by forced administration of antipsychotic drugs, "given" the defendant cognition; it is also necessary to examine whether the state has by these same means "taken away" important qualities of

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science"); *People v. Dalfonso*, 24 Ill. App. 3d 748, 749-50, 321 N.E.2d 379, 381 (1974) (following *Hampton*); *State v. Rand*, 20 Ohio Misc. 98, 103, 247 N.E.2d 342, 349 (C.P. 1969) (defendant being voluntarily treated with antipsychotic drugs is fit to stand trial). A defendant may wish to be tried while taking antipsychotic drugs out of a desire to prove his innocence or a preference for a determinate jail sentence over indeterminate institutional commitment.

<sup>7</sup> See, e.g., *Government of Virgin Islands v. Crowe*, 391 F. Supp. 987 (D.V.I.), *aff'd mem.*, 529 F.2d 511 (3d Cir. 1975); *People v. Parsons*, 82 Misc. 2d 1090, 371 N.Y.S.2d 840 (Nassau County Ct. 1975); *State v. Potter*, 285 N.C. 238, 204 S.E.2d 649 (1974); *State v. Law*, 270 S.C. 664, 244 S.E.2d 302 (1978); *State v. Stacy*, 556 S.W.2d 552 (Tenn. Crim. App. 1977).

<sup>8</sup> See *Senate Hearings*, *supra* note 3, at 571-73 (describing adverse side effects); see also *infra* notes 59-77 and accompanying text.

<sup>9</sup> This issue was recently briefed for the Supreme Court in *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985). See Brief for Petitioner, *Ake v. Oklahoma* (available Apr. 1, 1985, on LEXIS, Genfed library, Briefs file). Ake had been found fit to stand trial after having been treated with Thorazine. In his brief to the Supreme Court, Ake called into question the fitness ruling; he argued that the drug had rendered him unable and unwilling to assist his counsel and had altered his demeanor so as to prejudice him in the eyes of the jury. The brief stressed his "subjective feeling of isolation and uninvolvedness" and "zombie-like appearance." *Id.* Because the Court reversed Ake's conviction on other grounds, it did not reach the issue of forced administration of antipsychotic drugs. See *Ake v. Oklahoma*, 105 S. Ct. 1087, 1092 n.2 (1985). This comment argues that the focus of concern in this situation should not be the technical fitness requirement but rather the constitutional guarantees of confrontation and presence at trial. See *infra* notes 48-96 and accompanying text.

mood, emotion, or affect, with the result that the defendant loses his ability to participate fully in the trial through the exercise of his procedural rights of confrontation and presence. This second inquiry is necessary to limit the state's coercive power over criminal defendants so that these procedural rights are not vitiated by the forced administration of antipsychotic drugs.<sup>10</sup>

The first part of the comment examines the ways in which the courts have thus far handled the problem of forced administration of antipsychotic drugs to unfit defendants and concludes that these approaches have been too abstractly categorical and have failed to

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<sup>10</sup> Some authors have suggested that the mentally ill have an absolute constitutional right to refuse treatment with psychotropic drugs. See Rhoden, *The Right to Refuse Psychotropic Drugs*, 15 HARV. C.R.-C.L. L. REV. 363 (1980) (right to refuse antipsychotic drugs is based on constitutional right to privacy); Comment, *Madness and Medicine: The Forcible Administration of Psychotropic Drugs*, 1980 WIS. L. REV. 497 (right to mental autonomy and bodily integrity). But cf. Gutheil & Appelbaum, "Mind Control," "Synthetic Sanity," "Artificial Competence," and *Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 HOFSTRA L. REV. 77, 78 (1983) (argument for a constitutional right to refuse antipsychotic drugs weakened by fact that no evidence indicates that antipsychotic drugs are "mind-altering" or "thought-controlling").

A few courts have also found a substantive constitutional right to refuse treatment. In view of the direct and side effects of antipsychotic drugs, they have found a variety of interests that forced treatment may invade. See, e.g., *Bee v. Greaves*, 744 F.2d 1387, 1395 (10th Cir. 1984) (liberty and first amendment interests outweigh state interest in forcible administration of antipsychotic drugs to bring defendants to trial), *cert. denied*, 105 S. Ct. 1187 (1985); *Mackey v. Procunier*, 477 F.2d 877, 878 (9th Cir. 1973) (the integrity of one's "mental processes"); *Winters v. Miller*, 446 F.2d 65, 71 (2d Cir.) (first amendment rights of religious freedom preclude forcing a Christian Scientist to accept drug therapy absent life-threatening emergency), *cert. denied*, 404 U.S. 985 (1971); *Davis v. Hubbard*, 506 F. Supp. 915, 929-30 (N.D. Ohio 1980) (substantive due process affords right to refuse treatment with antipsychotic drugs); *Souder v. McGuire*, 423 F. Supp. 830, 832 (M.D. Pa. 1976) (cruel and unusual punishment and right to privacy); *In re Boyd*, 403 A.2d 744, 748 n.8 (D.C. 1979) (privacy interests, citing *Roe v. Wade*, 410 U.S. 113 (1973), and integrity of mental processes, citing *Mackey*). Other courts have not been receptive to this line of argument and have instead merely required a high degree of procedural due process protection prior to forced treatment. See, e.g., *Rennie v. Klein*, 653 F.2d 836, 848-51 (3d Cir. 1981) (en banc), *vacated and remanded*, 458 U.S. 1119 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983) (en banc); *Rogers v. Okin*, 634 F.2d 650, 656-57 (1st Cir. 1980), *vacated and remanded on other grounds sub nom. Mills v. Rogers*, 457 U.S. 291 (1982). *Rennie* was remanded for further consideration in light of *Youngberg v. Romeo*, 457 U.S. 307 (1982). *Youngberg*, however, addressed the right to receive—not the right to refuse—treatment. For this reason, at least one court has held that the reasoning in *Rennie* about a qualified right to refuse treatment was not affected by the Court's remand. *Osgood v. District of Columbia*, 567 F. Supp. 1026, 1031 n.1 (D.D.C. 1983). *Rogers* was remanded for further consideration in light of relevant state-law developments. The Court did not say, however, that the Constitution itself was not a sufficient source of protection. 457 U.S. at 300.

This comment neither asserts that there is an absolute right to refuse antipsychotic-drug treatment nor examines the procedural requirements for forced administration of antipsychotic drugs; it instead examines the consequences of such treatment for a criminal defense.

address adequately the functional concerns presented by the confrontation and due process clauses. The second part of the comment discusses the impact of antipsychotic drugs on the interests protected by these constitutional provisions. Finally, the comment proposes a new framework for resolving the problems raised by the interplay between the fitness standard and the use of antipsychotic drugs that may improve cognition while disabling the defendant in other constitutionally significant ways.

## I. ANTIPSYCHOTIC DRUGS IN CRIMINAL TRIALS: THE CASE LAW

Although there is sporadic evidence at common law of attempts by prison apothecaries to administer folk remedies intended to cure the insanity of defendants found unfit to stand trial,<sup>11</sup> the modern American case law concerning the use of antipsychotic drugs to make a criminal defendant fit begins with *State v. Hampton*.<sup>12</sup> In *Hampton*, an unfit defendant persuaded the court to permit her to be tried while taking Thorazine for her psychotic condition. A state sanity commission had found that Hampton, while under treatment, had a present capacity to understand the nature of the proceedings and assist in her defense, and the court held that the fact that this capacity was produced by antipsychotic medication was of "no legal consequence."<sup>13</sup> Thus, *Hampton* established the proposition that the state had no interest in preventing the trial of a defendant who could, by taking drugs, meet the fitness test: the court "[would] not look beyond existing competency and erase improvement produced by medical science."<sup>14</sup>

The logical connection between the *Hampton* holding and the conclusion that the state may compel unfit defendants to take antipsychotic drugs is not obvious. *Hampton* only affirmed that the fitness standard is a test of current ability to function<sup>15</sup> and held that the fact that Hampton was "only 'synthetically sane'"<sup>16</sup> constituted no fraud upon the court. From the fact that the state has no interest in preventing treatment, it does not follow that the state may compel treatment; yet the majority of courts that have

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<sup>11</sup> See, e.g., *Rex v. Frith*, 22 How. St. Tr. 307, 312 (1790) (refusal to take unspecified "drugs" after being examined for fitness to plead).

<sup>12</sup> 253 La. 399, 218 So. 2d 311 (1969).

<sup>13</sup> *Id.* at 403, 218 So. 2d at 312; accord *People v. Dalfonso*, 24 Ill. App. 3d 748, 750-51, 321 N.E.2d 379, 381 (1974).

<sup>14</sup> *Hampton*, 253 La. at 403, 218 So. 2d at 312.

<sup>15</sup> See Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 454 (1967).

<sup>16</sup> *Hampton*, 253 La. at 402, 218 So. 2d at 312 (quoting the trial judge).

considered the issue since *Hampton* have reached precisely this conclusion.<sup>17</sup> In doing so, they have lost sight of *Hampton's* emphasis on functioning and have instead relied upon categorical notions of mental disease and drug action.

In *State v. Hayes*,<sup>18</sup> for example, the court held that antipsychotic drugs did not affect the "process or content" of the defendant's thoughts, but rather "allow[ed] the cognitive part of the defendant's brain, which ha[d] been altered by the mental disease, to come back into play."<sup>19</sup> Other courts have found that antipsychotic drugs affect only the "emotional" and not the "cognitive" processes<sup>20</sup> and that the drugs allow "the mind to operate as it might were there not some organic or other type of illness affecting the mind."<sup>21</sup> Thus, psychoses are located in the "emotional" part of the brain, and the "cognitive" function—by inference, the "true mind"—is held to be untouched by the disorder.<sup>22</sup>

For these courts, mental activity involves at least two discrete functions—logical cognition and emotion—and any effect that antipsychotic drugs might have on the latter is all to the benefit of a criminal defendant.<sup>23</sup> The courts suggest that if antipsychotic drugs were shown to affect cognition, their use would be impermissible.<sup>24</sup> As long as their function seems to be only to suppress emotion, however, the law's revulsion against state control over men's minds<sup>25</sup> is not invoked, since "emotion" is not a part of the pro-

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<sup>17</sup> See, e.g., *Government of Virgin Islands v. Crowe*, 391 F. Supp. 987 (D.V.I.), *aff'd mem.*, 529 F.2d 511 (3d Cir. 1975); *People v. Dalfonso*, 24 Ill. App. 3d 748, 321 N.E.2d 379 (1974); *State v. Potter*, 285 N.C. 238, 204 S.E.2d 649 (1974); *State v. Law*, 270 S.C. 664, 244 S.E.2d 302 (1978); *State v. Stacy*, 556 S.W.2d 552 (Tenn. Crim. App. 1977) (all relying on *Hampton*).

<sup>18</sup> 118 N.H. 458, 389 A.2d 1379 (1978).

<sup>19</sup> *Id.* at 462, 389 A.2d at 1381 (defendant had been given Stelazine, Lithium, and Valium).

<sup>20</sup> See, e.g., *Government of Virgin Islands v. Crowe*, 391 F. Supp. 987, 989 (D.V.I.) (administration of Thorazine), *aff'd mem.*, 529 F.2d 511 (3d Cir. 1975).

<sup>21</sup> *State v. Jojola*, 89 N.M. 489, 492, 553 P.2d 1296, 1299 (Ct. App. 1976) (quoting expert testimony on effects of Thorazine).

<sup>22</sup> Under this view, the term "mental illness" is actually a misnomer, since it is not the "mind" but the emotions that are affected.

<sup>23</sup> See, e.g., *State v. Hayes*, 118 N.H. 458, 461, 389 A.2d 1379, 1381 (1978) (antipsychotic drugs have "a beneficial effect on the defendant's ability to function"); *State v. Blair*, 276 S.C. 644, 646, 282 S.E.2d 596, 597 (1981) (testimony of psychiatrist that drugs had a "beneficial effect in assisting patients with problems . . . to think logically").

<sup>24</sup> See, e.g., *State v. Hayes*, 118 N.H. 458, 461, 389 A.2d 1379, 1381 (1978); *State v. Jojola*, 89 N.M. 489, 492, 553 P.2d 1296, 1299 (Ct. App. 1976); *State v. Law*, 270 S.C. 664, 672, 244 S.E.2d 302, 306 (1978).

<sup>25</sup> Cf. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

tected "mind."

Thus, the courts have posed the constitutional issue as one of mind control by the government, and they have defined the action of antipsychotic drugs in such a way that the conclusion must be that the mind is not controlled. But either the mind is, as Professor Laurence Tribe suggests, "continuous and inchoate,"<sup>26</sup> or it consists of the cognitive function alone, upon which emotion is, during psychosis, an unwelcome burden. When the question is framed as a choice between considering the mind as an integrated whole from which no mental function is separable or, on the contrary, as an entity that can be broken down into such compartments as cognition, memory, and emotion,<sup>27</sup> most courts have chosen the latter view. This has made it difficult to define the nature of the defendant's rights and to identify their legal or constitutional source. Nevertheless, at least two distinct approaches have emerged from the cases.

The most common view is that a criminal defendant's right to be free from state interference with his mental processes during trial is a narrow one<sup>28</sup> and is only violated if the state-administered medication has a detrimental effect on the defendant's cognitive processes. The drugs must diminish the defendant's comprehension,<sup>29</sup> memory,<sup>30</sup> ability to communicate coherently and to confer with counsel,<sup>31</sup> or ability to "function in a . . . rational manner";<sup>32</sup>

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<sup>26</sup> LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-5, at 899 (1978) ("The operations of the mind are continuous and inchoate, extending well beyond an individual's conscious control. Although the ongoing experiences of thought and feeling may theoretically be fragmented into discrete processes, constitutional no less than common sense quickly reveals the difficulty and disingenuousness of ignoring their inevitable interdependence.").

<sup>27</sup> One inventory of categories of mental activity includes: cognition (intelligence), behavior (ability to perform daily skills), affect (emotional sensations such as anger, joy, and resentment), sensation (awareness of stimuli), imagery (self-esteem), and the ability to engage in interpersonal relationships. Young & Troiano, *Patient Characteristics*, in *MULTIMODAL HANDBOOK FOR A MENTAL HOSPITAL* 17, 21-25 (L. Brunell & W. Young eds. 1982).

<sup>28</sup> Some courts have located the source of this right in the due process clause of the fourteenth amendment, e.g., *State v. Jojola*, 89 N.M. 489, 493, 553 P.2d 1296, 1300 (Ct. App. 1976), or in provisions of state constitutions, e.g., *State v. Murphy*, 56 Wash. 2d 761, 767, 355 P.2d 323, 326-27 (1960). Others do not identify a source and apparently view the right as judicially created. E.g., *Commonwealth v. Louraine*, 453 N.E.2d 437, 442 (Mass. 1983); *State v. Hayes*, 118 N.H. 458, 462, 389 A.2d 1379, 1381 (1978).

<sup>29</sup> See, e.g., *State v. Jojola*, 89 N.M. 489, 492, 553 P.2d 1296, 1299 (Ct. App. 1976); *Ake v. State*, 663 P.2d 1, 6 (Okla. Crim. App. 1983), *rev'd on other grounds sub nom. Ake v. Oklahoma*, 105 S. Ct. 1087 (1985); *State v. Hancock*, 247 Or. 21, 28, 426 P.2d 872, 875 (1967); *State v. Law*, 270 S.C. 664, 670, 244 S.E.2d 302, 305 (1978); *Jones v. State*, 71 Wis. 2d 750, 754-55, 238 N.W.2d 741, 743 (1976).

<sup>30</sup> See, e.g., *State v. Hancock*, 247 Or. 21, 29, 426 P.2d 872, 875 (1967).

<sup>31</sup> See *State v. Law*, 270 S.C. 664, 671, 244 S.E.2d 302, 306 (1978).

<sup>32</sup> See, e.g., *id.*

drug-induced alterations of the defendant's mood or emotions are not considered.<sup>33</sup>

Courts adopting this view assume that the fitness standard covers all of the mental activity with which the Constitution is concerned under a due process analysis. Since the fitness standard is limited to cognition, they therefore hold that forced administration of drugs will violate the defendant's constitutional rights only if it interferes with cognitive functioning.<sup>34</sup> Once fitness is achieved, due process has been satisfied.<sup>35</sup>

At least one court, however, has defined the unfit defendant's right more broadly. In *State v. Maryott*,<sup>36</sup> the Court of Appeals of Washington held that the defendant's right to "exclusive control of his mental processes at the time of trial"<sup>37</sup> was violated because he was given medication that rendered him unnaturally "dull and listless" and "not . . . like himself" and "suspicious and uncommunicative [so that he] refused to assist in his defense."<sup>38</sup> The court asserted that "the ability of a man on trial to freely use his mental faculties" is a fundamental due process right.<sup>39</sup> The protection thus afforded the "mind" in *Maryott* was more extensive than the protection afforded by other courts because it included the whole range of the defendant's mental activity rather than being limited solely to cognition.

The approaches taken by the courts so far have been unsatisfactory. Their emphasis on "mind control" is fatally subject to definitional quibbles, so that the result a court reaches depends on what it defines the mind to include. The functional approach of *Hampton* has been ignored and with it the fact that the Constitution—in particular, the sixth amendment—affords criminal defendants rights that directly concern the functioning of a criminal trial.<sup>40</sup> The issue of forced treatment of persons unfit to stand trial

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<sup>33</sup> See, e.g., *State v. Hayes*, 118 N.H. 458, 461, 389 A.2d 1379, 1381 (1978) (only considering effects on "the cognitive part of the defendant's brain").

<sup>34</sup> See, e.g., *State v. Hancock*, 247 Or. 21, 28, 426 P.2d 872, 875 (1967) (if defendant was, owing to medication, "deprived of his ability in the absence thereof to comprehend the nature of the proceedings and to assist in his own defense," conviction will not stand).

<sup>35</sup> See, e.g., *State v. Jojola*, 89 N.M. 489, 491, 553 P.2d 1296, 1298 (Ct. App. 1976).

<sup>36</sup> 6 Wash. App. 96, 492 P.2d 239 (1971).

<sup>37</sup> *Id.* at 100, 492 P.2d at 241.

<sup>38</sup> *Id.* at 97-98, 492 P.2d at 240.

<sup>39</sup> *Id.* at 100, 492 P.2d at 241-242.

<sup>40</sup> Cf. *Faretta v. California*, 422 U.S. 806, 818 (1975) ("The Sixth Amendment includes a compact statement of the rights necessary to a full defense . . . . Because the rights are basic to our adversary system of criminal justice, they are part of the 'due process of law' that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States.").

must be analyzed in terms of those sixth amendment rights,<sup>41</sup> which are meant to assure a fair and error-free trial.

## II. THE TRIAL PROCESS AND ANTIPSYCHOTIC DRUGS

Due process prohibits the trial of a defendant who is not fit.<sup>42</sup> The legal standard for fitness is a test of cognitive rationality,<sup>43</sup> and, outside the context of forced drug administration, this test is a reasonable measure of procedural fairness. The use of antipsychotic drugs to produce fitness, however, raises other constitutional problems that are not adequately addressed merely by safeguarding a defendant's cognitive rationality. A drug that improves the cognition of an unfit defendant while vitiating other aspects of his mental state may make him less able to assume the role of a defendant than he was before treatment. Because the fitness test is not concerned with other mental processes that are important to the ability of an accused to defend himself, it is an inadequate criterion by which to measure a forcibly medicated defendant's ability to participate in his trial.

Although formulations of the fitness test differ, two elements predominate in most jurisdictions: (1) the present capacity to understand the nature of the proceedings, and (2) the capacity to assist defense counsel.<sup>44</sup> While these elements hardly form a precise

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<sup>41</sup> One court has taken a quite different approach by holding that an unfit pretrial detainee had a first amendment right to refuse treatment with antipsychotic drugs. *Bee v. Greaves*, 744 F.2d 1387, 1393-94 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 1187 (1985). Arguing that the first amendment protection of communication of ideas "implies protection of the capacity to produce ideas," the court held that forced administration of antipsychotic drugs interfered with the detainee's right to think and communicate free of restraints. 744 F.2d at 1394. In dictum, the court indicated that its analysis would apply in the trial context as well: "[A]lthough the state undoubtedly has an interest in bringing to trial those accused of a crime, we question whether this interest could ever be deemed sufficiently compelling to outweigh a criminal defendant's interest in not being forcibly medicated with antipsychotic drugs." *Id.* at 1395. The difficulty with *Bee's* first amendment analysis, however, is that it would apply equally to civilly committed mental patients, in conflict with the approaches taken by other circuits in such cases, where an absolute right to refuse drug treatment has been rejected in favor of a high degree of procedural due process protection prior to treatment. *See supra* note 10. Although the confrontation and due process interests of a criminal defendant differ significantly from those of a civilly committed patient, it is difficult to see why the first amendment interests should differ.

<sup>42</sup> *See infra* notes 98-101 and accompanying text.

<sup>43</sup> *See supra* note 2 and accompanying text; *infra* notes 44-45 and accompanying text.

<sup>44</sup> *See, e.g., Dusky v. United States*, 362 U.S. 402, 402 (1960) (a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him") (quoting statement of the Solicitor General); *State v. Hampton*, 253 La. 399, 403, 218 So. 2d 311, 312 (1969) (capacity to understand proceedings and assist in defense);



standard, it can be stated generally that fitness requires only a current capacity to comprehend and assist, not a lively intelligence or an accurate memory of events.<sup>45</sup>

A previously unfit defendant who has been treated with antipsychotic drugs will usually meet the constitutional fitness requirement.<sup>46</sup> This is not because the drugs are necessarily of net benefit to him in making his defense, but rather because fitness is a minimum cognitive standard that does not take account of the full range of his mental activity. But the fitness test, as formulated by the Supreme Court,<sup>47</sup> does not imply that cognitive fitness is necessarily to be pursued through means that alter or weaken other processes in the mental spectrum, processes that may be important to the ability of the accused to defend himself.

The coercive use of antipsychotic drugs to enable an unfit de-

State v. Buie, 297 N.C. 159, 161, 254 S.E.2d 26, 28 (capacity to comprehend position, understand nature and object of proceedings, conduct defense in a rational manner, and cooperate with counsel), *cert. denied*, 444 U.S. 971 (1979); ILL. REV. STAT. ch. 38, § 104-10 (1980 & Supp. 1984) (ability to understand the nature and purpose of the proceedings and to assist in defense); *see also* MODEL PENAL CODE § 4.04 (Proposed Official Draft 1962) ("No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced . . . so long as such incapacity endures.").

<sup>45</sup> *See, e.g.,* People v. Francabandera, 33 N.Y.2d 429, 435-36, 310 N.E.2d 292, 295, 354 N.Y.S.2d 609, 613-14 (1974) (rejecting amnesia as a basis for incompetence; statutory test is whether defendant, "with a modicum of intelligence," can assist counsel); Note, *supra* note 15, at 459 ("The standard of rational understanding emphasized in *Dusky* must be taken to mean no more than that the defendant be able to confer coherently with counsel and have some appreciation of the significance of the proceeding and his involvement in it.").

<sup>46</sup> Courts turn regularly to psychiatric experts for recommendations about fitness. *See* HENRY STEADMAN, BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL 54 (1979) (asserting that judges "very rarely disagree" with psychiatric opinions). Psychiatrists tend to define fitness, however, "in terms of traditional diagnostic symptomology rather than the defendant's capacity for courtroom functioning, equating incompetence with the presence of psychosis." Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 CAL. W.L. REV. 365, 377 (1981) (quoting Paythress & Stock, *Competency to Stand Trial: A Historical Review and Some New Data*, 8 J. PSYCHIATRY & L. 131, 134 (1980)). Medical skeptics point out that since it is lawyers and judges who define what a trial is and what due process requires, a psychiatrist is not equipped to decide whether an accused who displays certain psychotic symptoms can participate in a trial consistently with due process. *See* LABORATORY OF COMMUNITY PSYCHIATRY, HARVARD MEDICAL SCHOOL, COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS 20 (1973) [hereinafter cited as COMPETENCY TO STAND TRIAL]. Nevertheless, medical testimony about the effects of antipsychotic drugs concurs on the point that cognitive ability is improved with treatment.

<sup>47</sup> *See* *Dusky v. United States*, 362 U.S. 402, 402 (1960) (the test for fitness to stand trial "must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him") (quoting statement of the Solicitor General).

fendant to meet the fitness standard raises two sorts of questions. First, drugs that affect the emotions may inhibit the defendant's ability to function properly as a defendant. Although a defendant may have the capacity to understand the proceedings and assist his counsel, other effects of the drugs (e.g., diminished anxiety, unnatural apathy, and an increased level of trust of adversaries) may diminish his motivation to advise his lawyer about the cross-examination of witnesses. Second, the defendant whose personality and behavior during trial are altered by drug treatment is exposed to a high possibility of unwarranted prejudice in the eyes of the trier of fact. Even if it is not certain that there will be actual prejudice to the defendant's ability to make his case, coercion is fundamentally unfair where there is a reasonable possibility of prejudice.

### A. The Confrontation Clause

The sixth amendment's guarantee of a defendant's right "to be confronted with the witnesses against him"<sup>48</sup> has been construed to secure his right to be present at those stages of his trial "where fundamental fairness might be thwarted by his absence."<sup>49</sup> The principal value served by the defendant's presence is his ability to give advice and suggestions to his counsel during the course of the trial<sup>50</sup> and to be sure that his attorney "presents a vigorous

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<sup>48</sup> U.S. CONST. amend. VI.

<sup>49</sup> *Faretta v. California*, 422 U.S. 806, 816 (1975) (citing *Snyder v. Massachusetts*, 291 U.S. 97 (1935)); see also *Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.") (citing *Lewis v. United States*, 146 U.S. 370 (1892)); *United States v. Hayman*, 342 U.S. 205, 222 (1952) (dictum) (in a "criminal trial where the guilt of the defendant is in issue . . . his presence is required by the Sixth Amendment").

<sup>50</sup> See *Faretta v. California*, 422 U.S. 806, 816 (1975) (right of presence based on premise that defendant is enabled to "give advice or suggestion" to his attorney); *Illinois v. Allen*, 397 U.S. 337, 344 (1970) (noting that "one of the defendant's primary advantages of being present at the trial" is "his ability to communicate with his counsel" and holding that binding and gagging a criminal defendant at trial is not the fairest way to deal with a disruptive criminal defendant except in "some circumstances which we need not attempt to foresee"); *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934) ("A defendant in a criminal case must be present at a trial when evidence is offered, for the opportunity must be his to advise with his counsel . . . and cross-examine his accusers.") (citations omitted).

The Court in *Snyder* distinguished the privilege of presence, as found in the sixth amendment, from the privilege of confrontation, acknowledging the exceptions that have been made to the latter under established hearsay rules. 291 U.S. at 107. The Court made it clear that the privilege of presence is personal to the defendant and is not discharged by the ability of the defendant's counsel to participate: "[D]efense may be made easier if the accused is permitted to be present . . . to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself." *Id.* at 106.

The Court continues to rely on this formulation of the presence standard. In *Faretta v.*

defense.”<sup>51</sup> Although cross-examination is normally conducted by counsel, the defendant’s recollections and suggestions during the trial serve to aid counsel in carrying out that task.

The importance of the defendant’s ability to participate actively in the conduct of his trial, free from state interference, is illustrated in cases addressing the effective assistance of counsel. In *Geders v. United States*,<sup>52</sup> for example, the trial judge had ordered the defendant not to speak to his attorney during an overnight recess taken while the defendant was being cross-examined. The Supreme Court held that any “coaching” of the witness could be exposed by the prosecutor during cross-examination, and that even if cross-examination was not wholly efficacious, the defendant’s right to consult with his attorney about trial strategy must, under the sixth amendment, prevail over the government’s concern about coaching.<sup>53</sup> In *Ferguson v. Georgia*,<sup>54</sup> the Court struck down a state law prohibiting defendants from testifying under oath and allowing them only to make a statement to the jury without guiding questions from counsel.<sup>55</sup> The Court recognized that, under the pressures of a trial, a defendant might be unable to give a proper and complete statement without counsel’s direction.<sup>56</sup> Moreover, in *Faretta v. California*,<sup>57</sup> the Court held that the defendant’s sixth amendment interest in participating in the conduct of his trial was so important that it could override the state’s interest in requiring that the defendant be represented by an attorney.<sup>58</sup>

The importance of the defendant’s right to be present and participate in the conduct of his trial requires that the right be assured not only in form, but in effect as well. To be effectively present, a defendant must be alert, concerned, and ready to assist his counsel, not only when counsel asks for assistance, but whenever the defendant, of his own accord, sees the need to intervene. Thus, he must have not only the cognitive capacity to assist his

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California, 422 U.S. 806, 816 (1975), the Court found a criminal defendant’s right to represent himself to be implicit in the structure of the Sixth Amendment; it relied in part on the rationale of *Snyder* in finding that the presence standard supported the right to self-representation.

<sup>51</sup> *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 30, 98 (1970) (discussing *Illinois v. Allen*).

<sup>52</sup> 425 U.S. 80 (1976).

<sup>53</sup> *Id.* at 91.

<sup>54</sup> 365 U.S. 570 (1961).

<sup>55</sup> *Id.* at 596.

<sup>56</sup> *Id.* at 594-95.

<sup>57</sup> 422 U.S. 806 (1975).

<sup>58</sup> *Id.* at 832-34.

counsel—to understand the proceedings and to respond meaningfully to questions—but also the desire and initiative to do so. A defendant who is apathetic and distracted, whose defensive instincts are not keen, and who unquestioningly accepts the statements of the prosecution and the witnesses against him will not be able to exercise his right of presence and cross-examination in an effective manner.

Antipsychotic drugs produce precisely these sorts of attitudes as a concomitant of their beneficial effect on cognition.<sup>59</sup> Two common syndromes associated with antipsychotic drugs are akinesia and akathisia, which are characterized, respectively, by apathy and distraction.

Akinesia is “a behavioral state of diminished spontaneity characterized by few gestures, unspontaneous speech, and particularly, apathy and indifference toward initiating usual activities.”<sup>60</sup> There is “an attenuation of impulsivity, initiative, and motor activity.”<sup>61</sup> The patient may be “apathetic, lacking in spontaneity, relatively unable to participate in social activities, lifeless, zombie-like, or drowsy” as a result.<sup>62</sup> The government psychiatrist at the trial phase of *Dusky v. United States*,<sup>63</sup> for example, testified that Thorazine would make his patient “less agitated, less concerned. It might be he was so unconcerned he didn’t particularly care what he did.”<sup>64</sup>

It is often difficult to recognize the presence of akinesia because the patient often denies that he has any difficulty, while

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<sup>59</sup> JERROLD BERNSTEIN, HANDBOOK OF DRUG THERAPY IN PSYCHIATRY 54 (1983) (side effects of antipsychotic drugs are for the most part “directly related to the pharmacology of the drug and may indeed be an extension of some of the mechanisms responsible for the therapeutic action of a given compound”).

<sup>60</sup> D. KLEIN, R. GITTELMAN, F. QUITKIN & A. RIFKIN, DIAGNOSIS AND DRUG TREATMENT OF PSYCHIATRIC DISORDERS 199-203 (2d ed. 1980) [hereinafter cited as PSYCHIATRIC DISORDERS]; Rifkin, Quitkin & Klein, *Akinesia: A Poorly Recognized Drug-Induced Extrapyramidal Behavioral Disorder*, 32 ARCHIVES GEN. PSYCHIATRY 672, 672 (1975).

<sup>61</sup> Freyhan, *Psychopharmacology and the Controversial Clinician*, in DRUGS AND BEHAVIOR 184, 190 (L. Uhr & J. Miller eds. 1960).

<sup>62</sup> Davis, *Antipsychotic Drugs*, in 3 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2257, 2281 (H. Kaplan, A. Freedman & B. Sadock eds. 1980).

<sup>63</sup> 362 U.S. 402 (1960).

<sup>64</sup> Quoted in COMMITTEE ON PSYCHIATRY AND LAW, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, MISUSE OF PSYCHIATRY IN THE CRIMINAL COURTS: COMPETENCY TO STAND TRIAL 877 (1975) [hereinafter cited as MISUSE OF PSYCHIATRY]; see also Gelman, *Mental Health Drugs, Professionalism, and the Constitution*, 72 GEO. L.J. 1725, 1751 (1984) (antipsychotic drugs “possess a remarkable potential for undermining individual will and self-direction, thereby producing a psychological state of unusual receptiveness to the directions of custodians”).

"seemingly locked in some peaceful apathetic remoteness."<sup>65</sup> The patient's disinclination to speak<sup>66</sup> and his indifference to stimuli,<sup>67</sup> while perhaps beneficial from a psychiatric point of view,<sup>68</sup> are a definite liability to an effective criminal defense. An apathetic defendant who is disinclined to speak up during the give-and-take of cross examination cannot be of much help in his own cause, especially if he does not even recognize his own disinclination.

Akathisia is characterized by "involuntary motor restlessness, constant pacing, an inability to sit still, often accompanied by fidgeting, chewing and lip movements, and finger and leg movements."<sup>69</sup> While akathisia is often misdiagnosed as a symptom of anxiety,<sup>70</sup> it is in fact caused by the medication. The restlessness, inability to sleep, and urge to pace caused by the medication, result in "states of frank agitation."<sup>71</sup> Because the anxiety induced by this restlessness is easily mistaken for underlying psychotic anxiety, it is frequently mistreated by increasing the dosage of the antipsychotic medication.<sup>72</sup> Akathisia may be treated with an-

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<sup>65</sup> Van Putten, May & Wilkins, *Importance of Akinesia: Plasma Chlorpromazine and Prolactin Levels*, 137 AM. J. PSYCHIATRY 1446, 1446 (1980).

<sup>66</sup> Van Putten & May, 'Akinetic Depression' in Schizophrenia, 35 ARCHIVES GEN. PSYCHIATRY 1101, 1101 (1978).

<sup>67</sup> Winkelman, *A Long-Term Investigation of Chlorpromazine*, 116 AM. J. PSYCHIATRY 865, 866 (1960).

<sup>68</sup> LAWRENCE KOLB, MODERN CLINICAL PSYCHIATRY 624 (8th ed. 1973) ("If the patient responds well to [Thorazine], he develops an attitude of indifference both to his surroundings and to his symptoms."); Barahona-Fernandes, Cazullo, Cocchi, Denber, Freyhan, Klerman, Köknel, Levine, Saarma, Sarteschi, Vinar & Wittenborn, *Therapeutic Problems*, 5 MODERN PROBLEMS OF PHARMACOPSYCHIATRY 148, 152 (1970) ("the drugs really treat the condition in such a way that the devil still speaks to our patients, but they do not care much about it").

<sup>69</sup> PSYCHIATRIC DISORDERS, *supra* note 60, at 175.

<sup>70</sup> *Id.*

<sup>71</sup> Freyhan, *supra* note 61, at 191. One prisoner who was given Prolixin gave the following account:

There is no other feeling like it. Nothing to relate it to, no experience anyone would normally go through in their life. It affects you mentally and physically and you feel suicidal. The physical effects are so bad you can't stand it. You get muscle spasms, predominantly in the legs, but also in all other parts of your body including the facial muscles. You get lockjaw; you can't control your tongue; you get leg cramps. You get so tired (as if you've been up three days in a row) you lie down. But you can't stay down for more than three or four minutes because your knees begin to ache, an itching type ache.

Your thoughts are broken, incoherent; you can't hold a train of thought for even a minute. You're talking about one subject and suddenly you're talking about another. Zander, *Prolixin Decanoate: A Review of the Research*, 2 MENTAL DISABILITY L. REP. 37, 41 (1977).

<sup>72</sup> ROSS BALDESSARINI, CHEMOTHERAPY IN PSYCHIATRY 44 (1977).

tiparkinsonian drugs, but many cases respond poorly.<sup>73</sup>

The patient experiencing akathisia "is so beset by motor restlessness that he cannot concentrate, but is driven about restlessly."<sup>74</sup> The emotional apathy and lack of genuine initiative symptomatic of akinesia, combined with the physical restlessness and the distraction symptomatic of akathisia, produces a defendant who, though he is cognitively aware of his circumstances and can respond to questions lucidly, is not likely to help himself and his attorney during the trial.

The benefits of any therapy are contextual.<sup>75</sup> Medication that is beneficial to a patient in an institutional setting, because it is soothing and facilitates a trusting doctor-patient relationship,<sup>76</sup> is not similarly beneficial in a courtroom, where the apathy and pliability induced by the drugs can have detrimental consequences. Even if a doctor concludes that a course of treatment will make a patient fit to stand trial, medical opinion cannot be dispositive of the legal question of whether an accused can participate in a trial consistently with due process or confrontation.<sup>77</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> PSYCHIATRIC DISORDERS, *supra* note 60, at 175.

<sup>75</sup> It is necessary to classify a drug as "therapeutic" or "toxic" with reference to the setting in which the patient is placed. Cole, *Behavioral Toxicity*, in DRUGS AND BEHAVIOR 166, 178 (L. Uhr & J. Miller eds. 1960).

<sup>76</sup> *Id.* at 173.

<sup>77</sup> *Cf.* COMPETENCY TO STAND TRIAL, *supra* note 46, at 20 (fitness a legal, not a psychiatric, issue).

Of course, some defendants are naturally listless and apathetic, and it would be unrealistic for the confrontation clause to require all defendants affirmatively to demonstrate a lively interest in their trials. The critical distinction in this context is the element of state action in coercing the disability. A useful analogy can be drawn to the right-to-counsel cases. Some attorneys are simply incompetent at the task of managing a defense, and the functional concerns that lie behind the sixth amendment guarantees have led the Supreme Court to hold that, in extreme cases, actual attorney ineffectiveness results in such prejudice that there must be a new trial. *See Strickland v. Washington*, 104 S. Ct. 2052, 2067-68 (1984) (discussing standard of review for "actual ineffectiveness" of counsel); *see generally* Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. CHI. L. REV. 1380 (1983) (arguing for a distinction between the sixth amendment right to counsel and the due process right to a reliable verdict). The Supreme Court has, however, distinguished natural attorney ineffectiveness from ineffectiveness caused by government action. Where attorney ineffectiveness is caused by government action, the Court has developed a per se rule of reversal without the need to show actual prejudice. For example, where the state prevents the client from talking to his attorney during a recess, *see Geders v. United States*, 425 U.S. 80 (1976); *supra* notes 52-53 and accompanying text, or prevents the attorney from eliciting the defendant's unsworn testimony through questioning, *see Ferguson v. Georgia*, 365 U.S. 570, 596 (1961); *supra* notes 54-56 and accompanying text, or prevents the attorney from summing-up the evidence to the judge at a bench trial, *see Herring v. New York*, 422 U.S. 853, 864 (1975), the Court has not looked for actual prejudice but has applied a prophylactic rule of reversal. Such direct

## B. Due Process Considerations

An accused is also guaranteed the right to be present in the court during his trial by the due process clause of the fourteenth amendment,<sup>78</sup> a right that protects interests other than the opportunity for participation in the presentation of evidence. Presence helps to ensure that the defendant is properly identified by witnesses<sup>79</sup> and may also help to "sift[] the conscience of the witness."<sup>80</sup> Moreover, it may be advantageous to the defendant to appear personally, since his presence allows the jury to form an opinion of him:<sup>81</sup> it may be easier to convict an absentee than a real person in the courtroom.

The potentially prejudicial effect of the defendant's altered appearance and demeanor attributable to antipsychotic drugs, like the alteration of his keenness to participate in the trial, is subject to variation from case to case. Antipsychotic drugs may produce a markedly passive and apathetic or "zombie-like" appearance as a result of suppressed emotionalism.<sup>82</sup> Antipsychotic drugs may also cause profuse sweating, muscular tics, difficulty in swallowing, a shuffling gait, and an extremely disquieting tendency toward spasmodic eye-rolling and neck-twisting.<sup>83</sup> These effects are of special concern to criminal defendants to the extent that altered appear-

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interference with the effective assistance of counsel is easily corrected by categorical rules because the point of interference, in contrast with cases of natural ineffectiveness in a general sense, is easy to identify. See *United States v. Decoster*, 624 F.2d 196, 201 (D.C. Cir. 1979) (en banc) (plurality opinion of Leventhal, J.). Further, where the state is directly responsible, the interference is easy to prevent. *Strickland*, 104 S. Ct. at 2067; accord *United States v. Cronin*, 104 S. Ct. 2039, 2046-47 & n. 25 (1984).

The same rationale applies to defendant ineffectiveness produced by forced treatment with antipsychotic drugs. An ex post test of actual prejudice is inappropriate where the state interference—forced drug administration—is direct and easily prevented. The intrusion can readily be remedied by a prophylactic rule prohibiting forced treatment with apathy-inducing drugs.

<sup>78</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934); *Hopt v. Utah*, 110 U.S. 574, 578-79 (1884).

<sup>79</sup> 2 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 413 (London 1827).

<sup>80</sup> *Mattox v. United States*, 156 U.S. 237, 242 (1895). There was, at common law, a notion that a witness would be less likely to lie if forced to confront the defendant face-to-face. For an example of such a procedure, see Samuel Atkins' Account of his Examination before the Committee of Lords, appointed to examine the Murder of Sir Edmundbury Godfrey, 6 How. St. Tr. 1473, 1481 (1678).

<sup>81</sup> *Lewis v. United States*, 146 U.S. 370, 372 (1892) ("It would be contrary to the dictates of humanity to let [the defendant] waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence.") (quoting *Prine v. Commonwealth*, 18 Pa. 103, 104 (1851)).

<sup>82</sup> Davis, *supra* note 62, at 2281.

<sup>83</sup> *Senate Hearings*, *supra* note 3, at 571; see also Davis, *supra* note 62, at 2280; Winick, *supra* note 3, at 782 n.66.

ance, idiosyncratic movements, drowsiness, and unnatural rigidity may have a distracting or misleading effect on the trier of fact.<sup>84</sup> They may also have an effect on witnesses: if a witness might be tempted to lie about an absent defendant, he might also be tempted to lie about an unusually placid or distant one.

There is little doubt that the defendant's demeanor at trial may play an important, perhaps crucial, role in the outcome of the proceeding. In *State v. Murphy*,<sup>85</sup> for example, the Supreme Court of Washington ordered a new trial for a defendant who had been convicted of murder and sentenced to death by a jury because he had taken tranquilizers prior to giving testimony. Although the court did not doubt that the conviction was supported by the evidence, it held that the demeanor of the defendant during his testimony, which was "casual, cool [and] somewhat lackadaisical,"<sup>86</sup> may have had a prejudicial influence upon the jury's decision to order the death penalty.<sup>87</sup> The antipsychotic drugs may have made the defendant seem less remorseful and more calculating than he would otherwise have appeared.

The prejudicial effect of an unusually calm demeanor is of greatest concern when the defendant presents the defense of insanity.<sup>88</sup> Here, the link between the defendant's appearance at trial and his mental state at the time the crime was committed, though legally irrelevant, may be difficult for the finder of fact to ignore.<sup>89</sup> It may be quite difficult for a jury to look past the emotionless and rational defendant in court and see the serious psychosis from which he suffers. In addition, it may be difficult for a jury to credit the seriousness of a psychosis that can be "cured" by a relatively brief course of treatment with drugs that are considered not to affect "significant" mental processes. One psychiatrist who testified on behalf of a defendant appeared to recognize this problem. When asked whether the defendant was better able to assist his attorney while taking antipsychotic drugs, the doctor observed: "This I cannot answer directly because maybe his attorney's de-

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<sup>84</sup> Cf. *Estelle v. Williams*, 425 U.S. 501, 507-08 (1976) (due to potential for prejudice in the eyes of the jury, state may not force defendant to wear prison clothing at trial).

<sup>85</sup> 56 Wash. 2d 761, 355 P.2d 323 (1960).

<sup>86</sup> *Id.* at 766, 335 P.2d at 326.

<sup>87</sup> *Id.* at 767-68, 335 P.2d at 327.

<sup>88</sup> See *State v. Hayes*, 118 N.H. 458, 462, 389 A.2d 1379, 1381-82 (1978).

<sup>89</sup> See *State v. Maryott*, 6 Wash. App. 96, 101-02, 492 P.2d 239, 242 (1971); see also *In re Pray*, 133 Vt. 253, 256-57, 336 A.2d 174, 177 (1975) ("Since depression played a large part in the claimed insanity defense, an appearance of the defendant at trial that supported that condition might be viewed as helpful.").



fense would be better when he is at his worst.”<sup>90</sup>

It has been suggested that any potential prejudice can be counteracted by proper instructions to the jury,<sup>91</sup> or, perhaps, by allowing the jury to have a look at the defendant while he is taken off the drugs for a short time during the trial.<sup>92</sup> It has also been suggested that excerpts from videotaped interviews with the defendant, taken prior to drug treatment, can be shown to the jury to establish a “base line” of the defendant’s appearance and demeanor.<sup>93</sup> But to treat these concerns as purely evidentiary ignores the adversary context in which they occur.

The element of compulsion cripples the adversary system whenever there is a risk of prejudice. For example, when a defendant appears at his trial in prison clothing, the jury may or may not tend to be prejudiced against him. Where such prejudice is possible, however, the Court has held that the state cannot compel a defendant to wear such attire.<sup>94</sup> In a sense, a defendant in stripes presents a different persona to the jury than a defendant in a business suit. The same is true of treatment with antipsychotic drugs.<sup>95</sup> It may be that in some cases the drugged defendant’s altered demeanor would have no prejudicial effect on the jury. But the point of the prison-garb decision is that the state may not coerce the defendant into a position of even *potential* prejudice.<sup>96</sup>

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<sup>90</sup> Quoted in *MISUSE OF PSYCHIATRY*, *supra* note 64, at 876.

<sup>91</sup> See *State v. Law*, 270 S.C. 664, 671-72, 244 S.E.2d 302, 306-07 (1978).

<sup>92</sup> See *In re Pray*, 133 Vt. 253, 257-58, 336 A.2d 174, 177 (1975).

<sup>93</sup> See *MISUSE OF PSYCHIATRY*, *supra* note 64, at 904.

<sup>94</sup> *Estelle v. Williams*, 425 U.S. 501, 507-08 (1976); *cf. Illinois v. Allen*, 397 U.S. 337, 344 (1970) (preferring removal from court to binding and gagging of disruptive defendant, in part because “the sight of shackles and gags might have a significant effect on the jury’s feelings about the defendant”).

<sup>95</sup> [T]he interest of society in bringing an accused person to trial, and the interest of the defendant in having an opportunity to establish his innocence, cannot justify the risk that a man will be sent to his death because the side effects of the drugs that are being administered to him without his consent have made the jury believe that he has no interest in his case, no remorse for his crime, and, perhaps, is a “zombie” without a soul.

Brief for Petitioner, *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985) (available Apr. 1, 1985, on LEXIS, Genfed library, Briefs file).

<sup>96</sup> The defendant’s right to be present is not absolute. Like most procedural trial rights, it may be voluntarily waived. See *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (dictum); *Diaz v. United States*, 223 U.S. 442, 455-59 (1912); see also *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970) (dictum) (citing *Snyder* and *Diaz*); *cf. Taylor v. United States*, 414 U.S. 17, 20 (1973) (upholding constitutionality of provision of the Federal Rules of Criminal Procedure allowing voluntary waiver of defendant’s right to be present). The defendant may also forfeit the right to be present by behaving in a manner that is “so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.” *Allen*, 397 U.S. at 343. It cannot be said, however, that refusal to take antipsychotic

### III. THE NEED TO ANALYZE COGNITION SEPARATELY FROM EMOTION

One possible means of protecting a psychotic defendant's trial rights in the context of forced administration of antipsychotic drugs would be to alter the fitness standard itself. Thus, rather than focusing solely on the existence of a minimum level of cognitive ability, the standard for fitness to stand trial might incorporate a requirement that other mental processes be restored as well before a defendant could be brought to trial. Such a solution would be unsatisfactory, however, for two reasons: (1) fitness is capable of use as a sword as well as a shield, and a broadened test would allow too much room for prosecutorial manipulation; and (2) a broader standard would be inapplicable to, or undesirable for, the broad run of cases in which antipsychotic drugs are administered with the patient's consent.

Although the Supreme Court has held, in *Pate v. Robinson*,<sup>97</sup> that the conviction of an unfit defendant violates due process,<sup>98</sup> the rationale for the fitness requirement is not wholly clear. One commentator suggests that its purposes are to safeguard the accuracy of the trial proceeding, to ensure a fair trial, to preserve the "integrity and dignity" of the legal process, and to ensure that a convicted defendant knows why he is being punished.<sup>99</sup> Although some courts have analyzed fitness as a privilege of the defendant, which may be waived,<sup>100</sup> *Pate's* due process analysis does not appear to

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drugs is either a voluntary waiver or a forfeiture. Voluntary waiver of fundamental trial rights is not lightly presumed but is properly judged by the "intelligent and competent" standard of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). A defendant who refuses to take drugs and is not forced to take them cannot be tried in any event because he is not fit. And if refusal were interpreted as a voluntary waiver that allowed the state forcibly to treat the defendant with drugs, any notion of voluntariness becomes pure fiction.

<sup>97</sup> 383 U.S. 375 (1966).

<sup>98</sup> *Id.* at 385.

<sup>99</sup> MISUSE OF PSYCHIATRY, *supra* note 64, at 888-89.

<sup>100</sup> See, e.g., *State v. Hayes*, 118 N.H. 458, 462-63, 389 A.2d 1379, 1382 (1978); see also *People v. Tilson*, 108 Ill. App. 3d 973, 977-78, 439 N.E.2d 1298, 1301 (1982) (defendant who does not raise the issue of fitness until after his conviction deemed to have waived issue). But see *Commonwealth v. Tyson*, 485 Pa. 344, 349, 402 A.2d 995, 997 (1979) (waiver rules not applicable to fitness issue); cf. *Evans v. Kropp*, 254 F. Supp. 218, 222 (E.D. Mich. 1966) (had he been informed of his client's mental incapacity, attorney would have concealed unfitness of his client because he felt that a sentence of 10 years in jail was preferable to a life term in a state mental hospital); Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. CHI. L. REV. 21, 29-31 (1977) (suggesting that it is improper for defense counsel to avoid raising fitness issue for tactical reasons; he cannot make the decision to plead without his client's knowing and intelligent participation, and it would be improper for the attorney to waive fitness when the defendant cannot meaningfully assert his own choice).

support this approach. In *Pate*, the Court held that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."<sup>101</sup>

If the requirement of fitness is not a privilege of the defendant, neither is it an unmixed benefit to him.<sup>102</sup> Indeed, it appears that the prosecution, in order to buy time or to effect the institutionalization of an otherwise bailable accused, may raise the issue of fitness even when the defendant expressly wishes not to do so.<sup>103</sup> Crowded dockets and the expense of criminal trials may encourage prosecutors (and judges) to seek diversion of the defendant from the criminal-justice to the mental-health system.<sup>104</sup> Delay or diversion to a mental hospital may, in any given case, benefit the prosecution or the defense—or both.<sup>105</sup>

Thus, it should not be assumed that a defendant is automatically better off being found unfit to stand trial than being tried. The early litigation over fitness produced by antipsychotic drugs was instigated by defendants who preferred a trial to indefinite commitment.<sup>106</sup> Commitment is not necessarily less stigmatizing or arduous than prison; indeed, it may be considerably more so.<sup>107</sup> While open-ended unfitness commitments are no longer permitted,<sup>108</sup> the tendency of the courts to stretch civil commitment stat-

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<sup>101</sup> 383 U.S. 375, 384 (1966) (citing *Taylor v. United States*, 282 F.2d 16, 23 (8th Cir. 1960)).

<sup>102</sup> See Note, *supra* note 15, at 455 ("The broadened standard of incompetency and the power to determine the issue over a defendant's objection have enabled courts to impose upon a defendant the consequences of the often unrealistic assumption that an incompetency commitment will be less onerous than subjection to the criminal process.").

<sup>103</sup> See *State v. Rand*, 20 Ohio Misc. 98, 101, 247 N.E.2d 342, 344 (C.P. 1969) (prosecution may raise issue of fitness over objection of defense counsel); see also H. STEADMAN, *supra* note 46, at 16 (incompetency detention allows defendant to be kept in custody while prosecutor prepares his case "for more effective prosecution").

<sup>104</sup> See ALAN STONE, *MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION* 199 (1976).

<sup>105</sup> Dr. Thomas Szasz observes that the issue of fitness has become merely a "strategic ploy" in the criminal process. THOMAS SZASZ, *PSYCHIATRIC JUSTICE* 32 (1965). For this reason, he and Professors Robert Burt and Norval Morris have proposed abolition of the fitness requirement. See *id.* at 35-36; Burt & Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66 (1972). Sensible as the proposal may be, however, it appears to face considerable constitutional obstacles under the Supreme Court's decisions in *Pate* and *Dusky*.

<sup>106</sup> See, e.g., *State v. Hampton*, 253 La. 399, 218 So. 2d 311 (1969).

<sup>107</sup> Note, *supra* note 15, at 456; see also Winick, *supra* note 3, at 791 (hospitals to which unfit defendants are committed typically "are little more than grim storehouses in which treatment is grossly inadequate").

<sup>108</sup> See *Jackson v. Indiana*, 406 U.S. 715 (1972). In *Jackson*, the Court held that the state cannot hold an unfit defendant "more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [fitness] in the fore-

utes to allow long-term custody of unfit defendants is almost irresistible.<sup>109</sup> The unfit defendant is therefore faced with a dilemma: he can take antipsychotic drugs and undertake the risks of an unfair and inaccurate verdict, or he can refuse to take the drugs and risk retributive civil commitment. Under the circumstances, it cannot be assumed that the decision to refuse treatment will be made

seeable future." *Id.* at 738. If there is no progress toward fitness, the state must either institute ordinary civil commitment proceedings or, if the defendant is not thus committable, let him go free. *Id.*

Under *Jackson*, an unfit defendant who is permitted to refuse antipsychotic drugs may effectively block his attainment of fitness. As civil commitment is not always available, refusal to take drugs may result in the defendant's release. Professor Winick asserts that "an increasing number of incompetent defendants, particularly those with serious felony charges facing lengthy terms of imprisonment, find it strategically beneficial to be deemed permanently incapacitated so as to gain the 'benefits' of *Jackson*." Winick, *supra* note 3, at 792. Another observer has noted that "mental illness, once a weapon against the defendant, might become an impediment to the prosecution . . . . But in the end malingering may simply be a cost that reform must pay." A. STONE, *supra* note 104, at 215.

Such fears are not wholly justified. One state response to *Jackson* has been the discharge hearing, or "innocent-only trial," at which an unfit defendant may be acquitted of his charge but not convicted. See, e.g., ILL. REV. STAT. ch. 38, § 104-25 (1980 & Supp. 1984). Under such a system, if the state sustains its burden of proof of the charge, the treatment period may be extended for a specified length of time. See *id.* § 104-25(d)(1)-(2). The maximum commitment period under this statute is five years, but in no case may the treatment period exceed the statutory maximum sentence for the given crime.

In any event, it would be anomalous if *Jackson*, which was intended to expand the protection against indeterminate pre-trial detention, were read to contract the protection against unwanted mental interference. Though *Jackson* suggests that effective compulsory treatment is a rational purpose for the commitment of an unfit defendant, 406 U.S. at 738, this need not be read to imply that the unfit defendant must receive antipsychotic drugs in particular. In fact, it is highly unlikely that the Court had antipsychotic drugs in mind, since it took a dim view of the ability of "most of our mental institutions" to cope with unfitness. *Id.* at 735. The key point of the case was that the state provided no therapy at all to Mr. Jackson, whether he wanted it or not.

The state may, under certain circumstances, have a duty to provide treatment, but this does not cancel the unfit defendant's right to refuse treatment. See *In re K.K.B.*, 609 P.2d 747, 749 (Okla. 1980) (patient has an absolute right to meaningful treatment and also a contrary right to refuse treatment). In *Davis v. Hubbard*, 506 F. Supp. 915 (N.D. Ohio 1980), a class action filed by the inmates of a state mental hospital, the court argued that neither the State's obligation to provide treatment, its interest in caring for its citizens, its interest in protecting the safety of its charges, nor any other of its legitimate interests justifies the State's administration of psychotropic drugs absent the informed consent of the competent patient unless the patient presents a danger to himself or others in the institution.

*Id.* at 938 (emphasis added). To say that *Jackson* mandates forcible treatment with antipsychotic drugs is to say that psychotic defendants, by virtue of having been accused of a crime, must lose confrontation and due process rights that could not be denied to healthy defendants.

<sup>109</sup> Burt & Morris, *supra* note 105, at 71 ("If state officials cannot bring to trial an [unfit] person whom they believe to be a criminal, and cannot hold him simply because he is [unfit], it is far from unlikely that the civil commitment statute will be stretched to fit his case."); see *infra* note 110.

lightly.

A better approach would be to permit defendants to waive their rights under the confrontation and due process clauses if they desire to take antipsychotic drugs. The attitudinal effects of antipsychotic drugs are less relevant at the waiver stage because a defendant whose rational capacity has been restored by limited voluntary pre-trial treatment can respond to the questions and options posed by his counsel, family, and doctor in a non-adversarial, unhurried setting—a setting where the focus is on eliciting a knowing and intelligent statement from the defendant, not on the defendant's involvement in the give-and-take of an actual trial.<sup>110</sup>

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<sup>110</sup> The recognition of the psychotic defendant's right not to be forcibly given antipsychotic drugs in order to bring him to trial may also require some restrictions on the state's ability to assume guardianship over incompetent defendants. Some unfit defendants may have disorders that are so serious that they either cannot care for themselves or present a danger to others. If an individual has been adjudicated a civil incompetent, the state may assume guardianship over the individual either under the police power, "to protect the community from the dangerous tendencies of [the] mentally ill," *Addington v. Texas*, 441 U.S. 418, 426 (1979), or under the *parens patriae* power, the state's prerogative to act as "general guardian of all infants, idiots, and lunatics," *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*47).

When a criminal defendant is both unfit to stand trial and civilly incompetent, a conflict of interest arises between the state's role as guardian and its role as prosecutor. The state's duty to do what is in the best medical interest of the unfit defendant may result in a relaxed view of his legal interests, to the benefit of the prosecution. *Cf. Weissbourd, Involuntary Commitment: The Move Toward Dangerousness*, 15 J. MAR. L. REV. 83, 95 (1982) (premise that individual will benefit from *parens patriae* commitment often false). The unfit defendant's right not go to trial while involuntarily under the influence of antipsychotic drugs could become meaningless if the state could, under its *parens patriae* power, provide the defendant's "consent" to treatment with antipsychotic drugs. *Parens patriae* decisions are usually left to medical professionals, who are more qualified than judges or juries to determine what is appropriate to the health needs of their patients, *see Youngberg v. Romeo*, 457 U.S. 307, 323 (1982), but who know little about what is in the patient's best legal interest, *see Klerman & Schechter, Ethical Aspects of Drug Treatment*, in *PSYCHIATRIC ETHICS* 117, 121 (S. Bloch & P. Chodoff eds. 1981) ("The way is paved for patients to 'rot with their rights on.'") (quoting Gutheil, *In Search of True Freedom: Drug Refusal, Involuntary Medication, and "Rotting with Your Rights On"*, 137 AM. J. PSYCHIATRY 327, 327-28 (1980)).

What may be needed is some means by which adversary interests of an incompetent defendant who is unfit to stand trial can be asserted consistently with those of a competent defendant who is unfit to stand trial. One possible means is the "substituted judgment" approach adopted by some courts, under which a court attempts to determine the course of action the incompetent would have chosen if competent. *See, e.g., Rogers v. Okin*, 634 F.2d 650, 661 (1st Cir. 1980) (the *parens patriae* power must be asserted "with the aim of making treatment decisions as the individual himself would were he competent to do so"), *vacated and remanded on other grounds sub nom. Mills v. Rogers*, 457 U.S. 291 (1982); *In re Boyd*, 403 A.2d 744, 749-51 (D.C. 1979). An incompetent would not always "choose" to be medicated. *Cf. Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 747, 370 N.E.2d 417, 428 (1977) ("To presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the

If the defendant decides to go to trial while taking antipsychotic drugs, his counsel should inform the trial judge of this fact so that the judge can determine on the record that the waiver is knowing and voluntary, much as he would a plea of guilty or a waiver of counsel.

### CONCLUSION

Because the standard of fitness to stand trial is necessarily one of minimal cognitive ability, there is ample reason to find that a defendant taking antipsychotic drugs is fit to stand trial. Subject to a properly protective standard of waiver, it is proper to allow defendants voluntarily to take these drugs in order to stand trial.

A different analysis, however, is appropriate where a defendant refuses to consent to administration of the drugs. Antipsychotic drugs may affect the defendant's ability to make his defense, and the element of coerced alteration of mental condition (involving apathy, distractedness, and the tendency to trust one's adversaries) is not compatible with protection of the defendant's constitutional rights under the confrontation and due process clauses. Although the Constitution permits some interference with the defendant's physical liberty both before and during trial, it does not permit forcible interference by the state with core elements of the defendant's ability to conduct his defense.

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incompetent person . . ."). Under such an approach, the court, rather than second-guessing the medical practitioners, would step into the shoes of the incompetent. While perfect "substitution" might never be possible, consideration of the views of family, legal counsel, and medical advisors might serve to protect the defendant from a unilateral decision by the state that might otherwise be based too heavily on the state's interests.